BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: September 5, 1997

Case No: 95 INA 240

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT
Employer,

On Behalf of:

DAGOBERTO U. GALVAN
Alien

Appearance: Susan M. Jeannette, Agent

Before: Neusner, Holmes, and Huddleston
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Dagoberto Uribe Galvan ("Alien") filed by Employer Alberto's Mexican Restaurant, ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

An employer desiring to employ an alien on a permanent basis

must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

Statement of the case. On April 2, 1993, the Employer filed an application for labor certification to enable the Alien, a Mexican national, to fill the position of cook for Employer, the operator of a Mexican restaurant in Escondido, California. AF 125, 126, 137, 138.

The duties of the cook in the Employer's Mexican restaurant were described as follows:

> Cook for authentic Mexican restaurant with recipes passed through the family for generations. Must be able to use standard restaurant equipment and utensils. Able to prepare a wide range of Mexican foods including tacos, tostados, burritos, rice, beans, chile releno, carnitas, carne asada, machacha, etc. Garnish with lettuce, tomatoes, guacamole, and salsa. This schedule allows for a thirty minute meal break. Responsible for scheduling within his shift and control and recording of all inventory with respect to foods and paper products used during the shift.

The other special requirements stated by the Employer were:

> Must speak Spanish, as the crew only speaks Spanish and many of the customers only speak Spanish. Must have Foodhandler's card. Must pass drug testing, if hired.

AF 125. The required minimum educational level was eight years of grade school with two years of experience as a cook in a Mexican restaurant. The rate of pay was $8.00 per hour working from 11:00 AM to 7:30 PM daily in a forty hour week. By way of background, the Employer stated that the restaurant was open twenty-four hours a day. With a seating capacity for about thirty people, Employer serves one hundred and sixty meals a day. AF 127. This job opportunity was publicized by advertising in Hispanic newspapers and by word of mouth. AF 126-128.

The text of the advertised notice was as follows:

> COOK (6 openings), for Mexican restaurant w/2 locations,

> Poway & Escondido. Must have 2 yrs previous exper., have passed the food handler's exam. & have full knowledge & use of standard restaurant equipment. 40 hrs per wk. $8 per hr. Must speak Span/Eng. Job site & interview Escondido. Send this ad & your letter of qualifications to Job. #ET 2939, PO Box 26965 Sacramento, CA 95826-9065.

The Employer represented that in addition to restaurants at Poway and Escondido she also has a restaurant at Miramar in San Diego. AF 53, 60.[1]

Recruitment report. Responses were received by the state employment service from Enrique Larios and Mark Basso, both of San Diego, California. AF 132. The Employer reported on her effort to recruit U. S. workers for this position by her letter of January 15, 1994. Employer said, "Letters were sent to all applicants to come to be interviewed at the start of the shift July 15, 1994. No one showed up at the appointed time. Also, no one has responded to the JOB POSTING. And we have not had anyone come in from the JOB SERVICE." AF 14. Employer then sent these applicants a form notice that she was "conducting interviews" for the job at 6:30 AM on Saturday, January 15 at her restaurant in Poway. See AF 03, and compare AF 16.[2]

Notice of finding and rebuttal. On April 12, 1994, the CO notified the Employer that she had failed to document the existence of a bona fide job, the actual minimum requirements of the job, that the job was truly open, that a U. S. worker was rejected for lawful job related reasons, that a U. S. worker was contacted in a timely manner, that the foreign language requirement was not unduly restrictive, and that her application was complete.

Bona fide job. The CO observed that the Alberto's Mexican Restaurant at Escondido, California is the location where the Employer offered the position as cook. Noting that Employer's records indicated that nobody was currently employed at this location and that there were no cooks or other employees to supervise in Escondido, the CO questioned the Employer's good faith in proposing the job opportunity described in its application. AF 02, 03. Nidular Container Systems, Inc., 89-INA-228 (July 16, 1991)(en banc); Amger Corp., 87-INA-545 (Oct. 15, 1987)(en banc).

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[1]Employer proposed to hire three cooks for her Escondido restaurant. AF 06. The advertisement quoted differed from her application. AF 125.

[2]It is assumed that the July 15, 1994, date stated in the Employer' report at AF 14 was a clerical error, and that the intended date was January 15, 1994. The Employer explained that she designated Poway as the place for the interviews because it was the restaurant closest to her residence. AF 04.

Qualified U. S. worker. The state employment service referred at least two applicants for the advertised position, Enrique Larios and Mark Basso, both of San Diego, California. While the record does not contain the response by Mr. Basso, it does include the November 18, 1993, letter in which Mr. Larios answered the Employer's advertisement. In an undated letter that she mailed on an unknown date, Employer instructed the applicants to come to her restaurant at Poway, California, for an interview at 6:30 AM on January 15, 1994, even though her advertisement stated that the position and the interview would be at Escondido. AF 45, 133. Employer contends without documentation that she mailed this letter to Mr. Larios on January 3, 1994. On its face the Employer's delay in contacting the U.S. workers who applied for this job was material and the length of that delay was unreasonable. Pavillion Mortgage, Inc., 92-INA-270 (June 2, 1993)(five weeks); Com-Spec Properties, 91-INA-283 (December 1, 1993)(17 days); Hennessey's Tavern, Inc., 90-INA-437 (March 12, 1991)(45 days).

Discussion. In the Final Determination of August 23, 1994, the CO concluded that a U.S. worker was rejected for other than lawful job-related reasons, that the Employer failed to establish the existence of one or more bona fide jobs, and that Employer failed to provide a complete form ETA 750 B. 20 CFR §§ 656.21(b)(6), 656.3, 656.20(c)(4), 656.21(a)(1).

The CO found that the Alien's demonstrated experience as a restaurant cook was less than the two years specified by the job qualifications Employer stated as the actual minimum requirements for this position. 20 CFR § 656.21(b)(5). The CO's reasoning was based on the identity of ownership of the Alberto's restaurants at Poway and Escondido and in the commonality of the addresses and family names of members of "the Dominiguez family." AF 128. Taken without more, the shared addresses in Poway, California, are obviously suspicious and demanding of explanation by the Employer. But this single fact did not without more establish definitively that the two restaurants were owned by the same person. On the other hand, the Employer did not sustain its burden of proof to demonstrate that the two employers at Poway and Escondido were separate sources of restaurant work experience for the purposes of this application despite Employer's admission that she owned both places of business.

The facts that the Employer established are the following. (1) The Alien was employed as a cook in a restaurant in Tijuana, Mexico from January 1989 through December 1990. AF 30. (2) He worked in the United States for four years as an "independent contractor" for the Employer in her Alberto's Mexican restaurant in Poway from February 1990 to February 1992 and in Escondido from February 1992 to April 1993. AF 30, 139. (3) The Employer failed to establish by payroll documentation, however, that the Alien was an employee in an ethnic Mexican restaurant during the

periods asserted. (4) The Alien's work experience as an employee consists of two years of work as a restaurant cook in Tijuana, Mexico. AF 49, 64, 65.[3] The reasons is that Employer's payroll evidence proving his employment in the United States restaurants is conspicuously absent from the record. Moreover, because the nature, content, dates and rate of pay for the work the Alien performed as an "independent contractor" was not given, his self-employment in this fashion cannot be compared with the Employer's job specifications.

It is recognized that Employer's practice of subcontracting restaurant work to "independent contractors" rather than hiring workers on a normal payroll was a way to avoid the impact of the immigration statutes, all of which she admitted in her rebuttal. While the effectiveness of this subterfuge is not before us, the omission of employment records that this evasion of the United States immigration laws required also vitiated any credibility that otherwise would be accorded to the records Employer kept in the normal course of restaurant business. While her accountant called this a form of "off the book hiring," its usage to escape the impact of the immigration and other United States statutes evokes little sympathy in evaluating evidence offered to meet the Employer's burden of proof in support of her application for certification under the Act. In this instance, the nature and content of the Alien's agreement with Employer's Poway restaurant as an independent contractor are not a part of the record, and so are unavailable for comparison with the job requirements evaluate his experience as a restaurant cook as a qualification for this job.

Based on Employer's proof of record it is concluded that (1) the work expertise required by the Employer's ethnic restaurant business is no more than two years, regardless of the elaborate description of the position set out in her application, and (2) while the Alien established two years of experience as a cook in a Mexican restaurant before he entered the United States, his allegations of work for the Employer as an independent contractor as a cook in ethnic Mexican restaurants in the United States for an additional two to four years were not proven to be qualifying employment experience under the Act and regulations. Litton Aero Products, 91-INA-127 (January 27, 1993); Jackson and Tull Engineers, 87 INA 547.

(1) The denial of certification under § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), should be affirmed because the

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[3]While the CO suggests that he worked less than two years, based on this evidence, the dates self-evidently indicate a twenty-four month period in spite of the CO's implied suggestion that the period might be a few days short of complete. As this is not a pivotal question and as the documentation of record is otherwise probative of a period substantially two years long, this is the time period accepted as demonstrated by the Alien and the Employer in this case.

Employer failed to sustain its burden of proof that she made a good faith effort to reach and interview Mr. Larios, and to consider his application for the job opportunity, as provided by 20 CFR § 656,21(b)(6). Imperial Fashions, 93-INA-314 (10/24/94); Boerum Savvy Auto Care, Inc., 93-INA-140(2/27/94), Norm's Restaurant, 89-INA-280(12/1/90).

First, the Employer failed to contact these U. S. workers until a month and a half after they responded to her advertisement. While the Employer offered a discussion of the rush of holiday business to excuse her failure to take action on the applications of Mr. Larios and Mr. Basso at an earlier date, her response admits the delay and her explanation is not persuasive, since (1) the Employer, herself, chose the date to initiate this process, (2) the Employer placed the help wanted advertisement on the dates she chose, as well, and (3) the applicants were entitled to assume that Employer no longer was interested in hiring them and sought employment elsewhere in the busy holiday season.

In view of Employer's assumption that the Alien was able to cook Mexican food with only two years of work experience and the assertion by Mr. Larios of more than ten years of experience as a cook, the Employer was expected to prove that the ethnic cooking methods for a Mexican restaurant could not be learned by this job applicant and the vocational qualifications of Mr. Larios were superior to those of the Alien. Morrison Express Corp., 91-INA-077 (April 30, 1992).[4] In this context, it is observed that the Employer did not establish that she notified either Mr. Larios, the qualified candidate, or Mr. Basso, whose qualifications as a cook are unknown, that she intended to have the U. S. workers applying for the job demonstrate their cooking technique during her interview or that this was to be more than an interview. Even if the proposed test of cooking ability was disclosed at the time of Employer's purported telephone call to Mr. Larios this test was an unduly restrictive condition which Employer did not reveal to be a condition of employment in either her application or her advertisement. Finally, as it was to be given only to the U. S. workers who applied for this job, the test was an unduly restrictive condition of employment. Associated Students, Inc. 93-INA-311 (July 26, 1994).

The denial of certification under § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), should be affirmed for the further reason that the Employer's notification of the time and place of the interview was unproven, that she failed to ascertain the reasons for the failure of Mr. Larios to be present as requested by her, and that she failed to offer Mr. Larios an interview at a later date. First, the Employer did not offer evidence that her

[4]Regardless of whether or not Employer sustained her burden of proving the business necessity of her Spanish language requirement, Mr. Larios said he was fluent in both Spanish and English.

change in the location of the interview and her choice of the time to see them was convenient to the U.S. workers, who had no reason to know her reasons for choosing that time and place when they responded to her advertisement of the job opportunity.

Second, Employer contended without proof that she mailed a letter to Mr. Larios on January 3, 1994, and followed it up with a telephone call to advise him of the place, date and time of the interview. Assuming this to be true, it is inferred that Mr. Larios told the Employer that he was interested in the Escondido job. If that is the case, it is inconsistent with her stated need for cooks that she failed to telephone him again to find out why he did not arrive. As the Employer did not offer evidence other than her undocumented assertion that she reached these two applicants, her proof of this fact is equivocal and unpersuasive. Third, even though he expressly included the name and location of the country club where he had worked as a cook for more than a decade in responding to her advertisement, in her rebuttal the Employer argued that Mr. Larios had no verifiable previous employment. Instead of telephoning his previous employer to verify his work history, the Employer interpreted the failure of Mr. Larios to appear at Poway for the interview to indicate that did not have documentation entitling him to work. Moreover, in view of his long history as a U. S. worker, her demand for some form of work papers was an unreasonable precondition, since his November 18, 1993, letter asserted nearly twelve years of experience as a day cook at a country club in Rancho Santa Fe.[5] Margaret Hoffman, 92-INA-368 (December 16, 1993). Finally, even though Mr. Larios gave a telephone number and instructions for leaving a telephone message to contact him when neither he nor Mr. Bassos appeared at the Poway restaurant on the date and at the time directed in her letter the Employer did not attempt to reach him to reset the interview date or to ascertain whether he still was interested in her job offer. AF 16.

As we agree with the finding of the CO that Mr. Larios was qualified for this job by reason of his substantial work history in the United States, Employer had a duty to investigate his application and to reschedule the interview after Mr. Larios failed to appear at 6:30 AM on the date she had fixed. Suma Fruit International USA, Inc., 91-INA-047 (February 2, 1993), I & N Consulting Engineers, 90-INA-239 (July 31, 1991). As noted above, the Employer failed to call his former employer to check his references nor did she telephone Mr. Larios to determine that he was no longer interested in the job when he did not appear,

[5]Rancho Santa Fe is located between Poway and Escondido. Mr. Larios said his duties included preparing and serving meals for large groups, as well as breakfast and lunch service.

however.[6] It follows for these reasons that the Employer failed to demonstrate a reasonable effort to interview the U.S. workers referred to her in response to her advertisement under the Act and regulations. City Garment Finishers, 93-INA-019 (May 18, 1994).

(2) The Employer's failure to establish the existence of one or more bona fide jobs is inherent in the inferences drawn from the proof offered on this and other issues. Even though she indicated an intention to employ three cooks at the Escondido restaurant, applicant's quarterly statement of profit and loss for 1994 noted an actual payroll of $3,552, for the quarter, which on its face is grossly inconsistent with three cooks or even one cook at that location. AF 17.[7] At $8 per hour for a 40 hour week, the job at the Escondido restaurant would pay $320 per week or about $1,280 per month. Computed quarterly for three months, the rate of pay for this position indicates that the Employer expected to pay a total of $3,840 per cook per quarter for each of three positions in the Escondido restaurant alone. Employer's profit and loss statements indicate that it is problematical that her business volume for the Escondido restaurant could provide for one cook and the rest of her staff for a single shift.

While the indicated net profits suggest that the restaurant could pay for hiring more personnel, Employer's demonstrated cash flow is less than she claims because she offered no credible evidence that more than one person is at work for one shift at this time. See inter alia AF 05. On the other hand, the Employer held out her Escondido restaurant as operating twenty-four hours a day and it is reasoned that she must have had more than one worker as cook. By way of showing on rebuttal that a business did exist at Escondido, the Employer submitted a copy of the restaurant's business license and a menu to show that it was open 24 hours a day. AF 128, 129. While her profit and loss sheet provided data as to the gross income of the business, the Employer did not reveal the number or the wages of each of her

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[6]We reject Employer's unsupported comments that Mr. Larios was unwilling to work for her, and that he failed to attend the interview at the appointed time and place for other reasons unrelated to the work. The credibility of her remarks is lessened by her failure to make a reasonable effort to communicate again with Mr. Larios. In view of her expressed need for as many as six cooks in her restaurants, an experienced cook such as Mr. Larios would seem to have been a very desirable employee and well worth the expenditure of extra effort to hire him. Instead, on the same day as she scheduled the interview the Claimant ended all such efforts when she sent out her recruiting report.

[7]Her rebuttal supplied parallel financial data for the Poway restaurant, where her payroll was $4,158 for the same period and for the San Diego/Miramar restaurant, where her payroll was $5,666 for the same period. AF 55, 56.

employees at the Escondido restaurant. AG 127.[8] While Employer suggested that her profit and loss statements understated the true capacity of her business to hire and pay for the services of the Alien, she did not remedy her failure to establish that the business could support and pay wages for the job at issue. For these reasons, Employer's documentation that fails to show a payroll equal to the number of workers necessary to conduct the business described by her does not establish that a bona fide job exists or that her business can pay for the Alien worker whose certification she seeks or that she complied with the directions of the CO to present evidence of her capacity to pay the promised wage rate for the position advertised.[9]

The Employer's representations did serve as an admission, however, that she had non-work related reason for employing an unstated number of undocumented alien workers as "independent contractors," including the Alien, himself. She further admitted that the Alien had worked in her restaurant as an independent contractor and in another California restaurant for at least four years. Employer said that she relied heavily on "independent contractor" arrangements with the people who worked for her three restaurants, explaining:

> The fact that the aliens are not listed on the payroll records is due to the fact that they did not have valid social security numbers and could not be placed on the payroll as such. They had to become independent contractors with the responsibility for their own taxes., etc. This is another reason why [the Employer] is sponsoring workers, so that she can get her business on an even keel with the proper legal help working established shifts.

AF 54. This assertion was corroborated by Alien's declaration subject to 28 U.S.C. 1746 that in addition to lawful employment as a restaurant cook in Mexico from January 1989 to December 1990, his experience as a restaurant cook included two years of work as an "independent contractor" for the Alberto's Mexican restaurant owned by Abel Domingues from February 1990 to February 1992 and for the Alberto's Mexican restaurant at Escondido owned by Employer from February 1992 to April 1993. AF 30.[10]

For these reasons it is concluded that the CO correctly

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[8]The Employer withdrew the provision in her application that the Alien would supervise three other employees.

[9]For reference to twenty-four hour a day operation see AF 126.

[10]It is inferred from the statement of Juan Diego Rodriguez that Alien's employment by Abel Dominiquez from February 1990 to February 1992 was at the Alberto's Mexican Restaurant located in Poway, California. AF 61.

concluded that the Employer failed to establish the existence of a bona fide position for the employment of the Alien. Rick Trading Corp., 92-INA-375 (August 26, 1993); Aloha Airlines, 92-INA-181 (June 1, 1992); Kagan & Moore Architects, Inc., 90-INA-466 (May 10, 1991).

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **ALBERTO'S MEXICAN RESTAURANT**
(Dagoberto Uribe Galvan)

Case No. : 95-INA-240

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: November 20, 1996